



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 11, 1997

Mr. James D. Braddock
Kelly, Hart & Hallman, P.C.
301 Congress, Suite 2000
Austin, Texas 78701

OR97-2733

Dear Mr. Braddock:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 110742.

The Fort Worth Dallas Ballet (the "ballet"), which your office represents, received a request for "copies of minutes of the specially called executive committee meetings on June 12, 1997, and July 24, 1997, as well as the results of two internal investigations of sexual harassment charges." In response to the request, you have submitted the information, which you contend is responsive.¹ In your original letter to this office requesting a ruling, you asserted that the ballet is not a governmental body for purposes of section 552.003 of the Government Code. Alternatively, you also argued that the submitted information is excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted information.

Specifically, we note that in your original submitted brief, you only raised arguments in support of your position under section 552.003, and generally explained how section 552.101 applied to some of the submitted information.² In subsequent correspondence, you submitted additional arguments in support of the claimed exceptions, and asserted that certain information did not exist. Before we can consider the application of the claimed exceptions to the submitted information, we must first consider whether the ballet is a governmental body under the act.

¹You have also submitted to this office information that apparently was sent for informational purposes only. In this ruling, we do not address the public disclosure of that information.

²The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974).

The Open Records Act applies to information of every "governmental body," as defined in section 552.003(a) of the Government Code. Section 552.003 of the Government Code defines "governmental body," in part, as follows:

the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds.

Gov't Code § 552.003(a)(10). Public funds are "funds of the state or of a governmental subdivision of the state." Gov't Code § 552.003(c).

Courts, as well as this office, previously have considered the scope of the Open Records Act's definition of "governmental body." For example, in *Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), an appellate court examined the financial relationship between Texas public universities and the National Collegiate Athletic Association ("NCAA") to determine whether the NCAA was a governmental body within the statutory predecessor to section 552.003(a)(10). The court below had concluded that the NCAA was subject to the Open Records Act, finding that its receipt of dues, assessments of television rights fees, and unreimbursed expenses from state universities constituted general support with public funds. The appellate court reversed, holding that the NCAA fell outside the definition of a governmental body in the act because the public university members received a quid pro quo in the form of specific, measurable services. *See also A. H. Belo Corp. v. Southern Methodist Univ.*, 734 S.W.2d 720 (Tex. App.--Dallas 1987, writ denied) (finding that funds distributed by Southwest Conference to private university members were not public funds; thus, private universities were not governmental bodies).

The Open Records Act does not apply to private persons or businesses simply because they provide goods or services under a contract with a governmental body. Open Records Decision No. 1 (1973) (concluding that bank that holds funds of governmental body is not subject to act). An entity that receives public funds is not a governmental body if its agreement with the government imposes "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." Open Records Decision No. 228 (1979) at 2; *see also* Attorney General Opinion JM-821 (1987).

If, however, a governmental body makes an unrestricted grant of funds to a private entity to use for its general support, the private entity is a governmental body subject to the Open Records Act. Open Records Decision No. 228 (1979). If a distinct part of an entity is supported by public funds within section 552.003(a)(10) of the Government Code, the records relating to that part or section of the entity are subject to the Open Records Act, but records relating to parts of the entity not supported by public funds are not subject to the act. Open Records Decision No. 602 (1992).

The following decisions found certain private entities to be governmental bodies under section 552.003(a)(10) or its statutory predecessor: Attorney General Opinion JM-821 (1987) (volunteer fire department receiving general support from fire prevention district); Open Records Decision Nos. 621 (1993) (Arlington Chamber of Commerce and Arlington Economic Development Foundation, through which chamber of commerce receives support of public funds); 602 (1992) (portion of the Dallas Museum of Art that is supported by public funds); 273 (1981) (search advisory committee that was established by board of regents to recommend candidates for university presidency and that expended public funds); and, 228 (1979) (private, nonprofit corporation, with purpose of promoting the interests of the area, that received general support from city). Alternatively, the following decisions found other private entities not to be governmental bodies under the statutory predecessor to section 552.003(a)(10): Open Records Decision No. 602 (1992) (portion of the Dallas Museum of Art not supported by public funds, in particular, a specific privately donated art collection); and, 569 (1990) (Fiesta San Antonio Commission, which leases facilities from city and receives permits and licenses to use public streets for parades and other events).

In Attorney General Opinion JM-821 this office said "[t]he primary issue in determining whether certain private entities are 'governmental bodies' under the act is whether they are supported in whole or in part by public funds or whether they expend public funds." Attorney General Opinion JM-821 (1987) at 2. According to the ballet, "[f]or the twelve-month period beginning September 1, 1996, less than 10% of the Ballet's budget came from the Texas Commission on the Arts and the Arts Council of Fort Worth and Tarrant County." However, the requestor contends that the ballet, "while not a governmental agency," is subject to the act, because it is supported in whole or in part by public funds received from "the Neighborhood Arts Program and the Commission for the Arts, which are supported by taxpayer monies."

In your brief, you state that although the Arts Council "does receive approximately 30% of its funding from public organizations, including the State of Texas, the City of Fort Worth, and Tarrant County, that funding can no longer be considered public funds once it is received by a private organization such as the Arts Council and then distributed to others." We disagree with your conclusion. The Open Records Act defines "public funds" as "funds of the state or of a governmental subdivision of the state." Gov't Code § 552.003(c). The grants of federal, state or local funds that the ballet receives from the Arts Council are public funds within this provision. See Open Records Decision Nos. 201 (1978), 195 (1978). It is evident from the submitted information that the ballet receives funds from at least two different entities, which in turn receive public funds as a portion of their funding. Since we have determined that the ballet receives public funds, we must next consider whether a measurable amount of service is rendered by the ballet in exchange for the public funds as would be expected in a typical arms-length quid pro quo contract for services. See Open Records Decision No. 228 (1979).

The ballet has provided to our office grant application forms submitted to the Arts Council and contracts with the Texas Commission on the Arts Funding. The submitted "On Campus Residency Program" grant application, Exhibit B, indicates that the ballet planned

for dance instruction, scholarships, and outreach programs at certain elementary schools. Additionally, the submitted "Contract for Services between the Fort Worth Commission on the Arts and the Fort Worth Dallas Ballet," Exhibit D, indicates that certain services were required of the ballet.

Based on our review of the submitted grant applications and contract language, it appears that although in some instances grant funds are used for specified services, in others the ballet receives assistance for its general day to day "operational support" from sources that receive some portion of their funding from public sources.³ From Exhibits B and D, it could be surmised that "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money," exists on the part of the ballet. Tex. Att'y Gen. No. JM-821 (1987), *quoting* ORD-228 (1979). However, the submitted "General Operating Assistance for fiscal year 1997," Exhibit C, indicates that the ballet receives some measure of public funds from the Arts Council *without* a requirement of any specific services being rendered in exchange, "as would be expected in a typical arms-length contract for services between a vendor and purchaser." *Id.* Therefore, in the absence of other information from the ballet establishing that the funds received from public sources are not used for the general support of the ballet, we conclude that the ballet is a governmental body for purposes of the Open Records Act.

Since this office has concluded, based on the preceding analysis, that the ballet is a governmental body subject to the act, we now consider the applicable provisions of the act to the requested information. In correspondence to this office, you have indicated that certain documents did not exist at the time the request for information was received. We note that chapter 552 does not apply to information that does not exist. *See* Open Records Decision No. 555 (1990). Nor does chapter 552 require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio, 1978, *writ dismissed*); *see also* Open Records Decision No. 87 (1975). Therefore, the ballet does not have to release information that did not exist at the time of the request.

We note that information that a statute other than chapter 552 expressly makes public is not subject to the exceptions to required public disclosure. Open Records Decision No. 623 (1994) at 3. The minutes, tape recordings, and agenda of an open meeting are public records. Gov't Code §§ 551.022 (minutes and tape recordings), .041 (notice), .043 (time and accessibility of notice), .045 (emergency addition to agenda). Alternatively, section 551.104 of the Government Code, a provision of the Open Meetings Act, makes the tape of a properly closed meeting confidential. *See* Gov't Code §§ 551.104(c) ("The certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)"); *see also* § 551.146 (public disclosure of certified agenda of meeting that was lawfully closed to public is prohibited); Open Records Decision No. 495

³You have stated that the Arts Council "does receive approximately 30% of its funding from public organizations, including the State of Texas, the City of Fort Worth, and Tarrant County."

(1988) (Open Meetings Act specifically makes confidential certified agendas or tapes of executive sessions). However, records that were discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992). We will next consider the applicability of the claimed exceptions to the submitted information.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The ballet has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The ballet must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you state that a complaint has been filed with the Equal Employment Opportunity Commission ("EEOC"). You have provided this office with a copy of the complaint. This office has previously held that a pending complaint before the EEOC indicates a substantial likelihood of litigation. Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). Given the circumstances that you have shown, we find that the ballet has met the first prong of the section 552.103(a) test. We also conclude that the requested information is related to the anticipated litigation. Therefore, because you have made the requisite showing that litigation is reasonably anticipated and that the requested information relates to that anticipated litigation, you may withhold the requested information under section 552.103(a).

We note, however, that generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.⁴ Open Records Decision Nos. 349 (1982), 320 (1982).

⁴We note, however, that if the requested information is issued in a public report or otherwise made available to the public, generally, you must also provide the information to this requestor. Gov't Code § 552.007 (information made public may not be selectively withheld).

Additionally, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, you may not release information made confidential by sections 552.101 and 552.117 or other law, even after the litigation has concluded.⁵

As we resolve your request under sections 552.103, we need not specifically address your other claimed exceptions at this time. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 110742

Enclosures: Submitted documents

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⁵Specifically, in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. We also note that sections 552.024 and 552.117 provide that a public employee can opt to keep private the employee's home address, home telephone number, social security number, or information that reveals that the individual has family members.